

1-1-2011

Case: In the case of the *Prosecutor v. Thomas Lubanga Dyilo*

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Recommended Citation

Jonathon Handelman, *Case: In the case of the Prosecutor v. Thomas Lubanga Dyilo*, 11 Chi.-Kent J. Int'l & Comp. Law (2011).

Available at: <https://scholarship.kentlaw.iit.edu/ckjicl/vol11/iss1/9>

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Court: International Criminal Court, Appeals Chamber
Case: In the Case of the Prosecutor v. Thomas Lubanga Dyilo
Date: October 8, 2010
Written by: Jonathon Handelman

The issue was whether Trial Chamber I erred when it decided to stay the proceedings and release the accused upon its finding that a fair trial was no longer possible as a result of the Prosecution's failure to implement an order by the Chamber. The Appeals Chamber agreed that the Prosecution was bound to the Chamber's order, but it found that the Trial Chamber erred when it resorted to the drastic remedy of staying the proceedings without first using sanctions, a more appropriate tool to bring the Prosecution into compliance.

Thomas Lubanga Dyilo (Dyilo) has been on trial since January 2009 for the war crime of enlisting children under the age of fifteen into the Patriotic Forces for the Liberation of Congo (FPLC) and using them to participate actively in armed conflict between September 2002 and August 2003. He is the alleged founder and former Commander-in-Chief of the FPLC.

On October 8, 2010, the Appeals Chamber of the International Criminal Court overturned a decision by the Trial Chamber to stay proceedings for Dyilo's trial. This judgment concerns the Prosecutor's appeal of the Trial Chamber's decision of 8 July 2010 entitled "Decision on the Prosecutor's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations with the VWU."

The Trial Chamber decided to stay the proceedings regarding the Prosecutor's use of intermediaries, persons who introduced witnesses to the Prosecutor, or who contacted

witnesses on his behalf, and the allegations that some intermediaries had sought to induce witnesses to testify falsely before the Court.

The Trial Chamber rendered the “Decision on Intermediaries” by ordering the identity of intermediary 143 to be disclosed to Dyilo once the necessary protective measures were implemented, but the Court ultimately held that there was not a sufficient basis to call intermediary 143 to testify. While no specific allegations were made against intermediary 143, the testimony of some of Dyilo’s witnesses put into question or contradicted evidence that was given by witnesses who were introduced to the Prosecutor by intermediary 143.

Dyilo, who was about to commence questioning of another intermediary (intermediary 321), argued that the identity of intermediary 143 was necessary for this questioning. Thus, he argued that the delay in producing intermediary 143 was unreasonable. The Trial Chamber agreed and held that for Dyilo to properly question intermediary 321, he needed to know the identity of intermediary 143. The Court held that the delay in producing intermediary 143 was substantial for Dyilo. In order to move the trial forward while at the same time protecting the identity of intermediary 143, the Trial Chamber ordered the limited disclosure of the identity of intermediary 143 to Dyilo’s counsel and assistants with the express provision that the information obtained was not to be disseminated. The Trial Chamber stayed the order overnight after obtaining knowledge that the Prosecutor intended to appeal.

After deliberating, the Trial Chamber found that there was no increased risk to intermediary 143 from limited disclosure of his or her identity and that it was therefore not necessary to continue to suspend the order on disclosure pending the filing of an

application by the Prosecutor for leave to appeal. The Trial Chamber ordered the Prosecutor to identify intermediary 143 (the First Order of Disclosure). The Prosecutor did not disclose intermediary 143's identity or ask for an extension of the time limit. After dismissing an oral request from the Prosecutor to reconsider the First Order of Disclosure, the Trial Chamber again ordered the Prosecutor to disclose the identity of intermediary 143 (the Second Order of Disclosure). Again the Prosecutor failed to disclose the required information.

The Prosecution then requested a Variation of the Time Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultations. The request stated that while the Prosecution had an obligation to comply with the Chamber's instructions, it had an independent statutory obligation to protect persons put at risk on account of the Prosecution's actions and that it should not comply or be asked to comply with an order that may require it to violate its separate statutory obligation by subjecting the person to a foreseeable risk. The Trial Chamber took note of the Prosecutor's clearly evidenced intention not to implement the Chamber's orders if he considered that they conflicted with his interpretation of his other obligations and observed that the Prosecutor appeared to argue that he had autonomy separate from the orders of the Court. The Court emphasized that the Trial Chamber is the only organ of the Court with the power to order and vary protective measures and held that it was necessary to stay proceedings as the fair trial of the accused was no longer possible and justice could not be done.

Before the Appeals Chamber the Prosecutor argued that the Trial Chamber erred when it concluded that it was necessary to stay the proceedings and it was an abuse of the

process of the Court because: (1) the Trial Chamber erred when it found that the Prosecutor refused to comply with the Chamber's orders of 7 July 2010; (2) the Trial Chamber erred by misconstruing the position of the Prosecution with respect to its duties of protection, finding, as a result, that the Prosecution's position constituted an unjustified intrusion into the role of the judiciary and prevented the Chamber from ensuring the fairness of the proceedings and protecting the rights of the accused; and (3) the Trial Chamber erred in concluding that the Prosecution's actions constituted an abuse of process and imposed a premature and unnecessary remedy by staying the proceedings.

In response, Dyilo argued that it was indisputable that the Trial Chamber has authority over the Prosecutor with respect to the protection of persons and that the exercise of the Prosecutor's responsibility under Article 68 of the Rome Statute (setting out procedures for the "protection of the victims and witnesses and their participation in the proceedings") is subject to the authority of the Trial Chamber. He argued that it was unacceptable that the implementation of a judicial decision should be subject to the Prosecutor's discretion and to his personal interpretation of his obligations and of the interests at stake. Finally, he argued that the stay of proceedings was a logical and inevitable consequence of the behavior of the Prosecutor: the refusal of the Prosecutor to comply with the Trial Chamber's orders had obstructed the Defense's effort to demonstrate the existence of a concerted plan to manipulate evidence in which the Prosecutor was implicated and accordingly made it impossible to conduct a fair trial.

The Appeals Chamber held that the Prosecutor failed to comply with both Orders of Disclosure and remained in noncompliance at the time of the Impugned Decision. It went on to hold that the Prosecutor's non-compliance was deliberate and that such a

wilful non-compliance constituted a clear refusal to implement the orders of the Trial Chamber. The Appeals Chamber went on to hold that the Trial Chamber, subject only to the powers of the Appeals Chamber, is the ultimate guardian of a fair and expeditious trial and that when there is a conflict between the Prosecutor's perception of his duties and the orders of the Trial Chamber, the Trial Chamber's orders must prevail. The Appeals Chamber further stated that this is a fundamental criterion for any trial to be fair. It finally held that there is no exception to the general principle that the Prosecutor (or other parties and participants) must follow the orders of the Trial Chamber when it comes to issues of protection. In sum, the Appeals Chamber was not persuaded by the first and second errors alleged by the Prosecutor. It held that the Trial Chamber did not err when it found that the Prosecutor refused to comply with the First and Second Orders of Disclosure, and that irrespective of whatever duties the Prosecutor may have, he is obliged to comply with the orders of the Trial Chamber.

The Appeals Chamber noted that a stay of proceedings is a drastic remedy and that in order for a Trial Chamber to impose a stay of proceedings, it must be impossible to piece together the constituent elements of a fair trial. It held that while the actions of the Prosecutor threatened not only Dyilo's right to be tried without undue delay but also the fairness of the proceedings as a whole, the Trial Chamber had not yet lost control of the proceedings of this case. The Appeals Chamber noted that the Trial Chamber had the option of imposing sanctions against the Prosecutor, a normal and proper means to bring about compliance in the face of refusals to follow the orders of a Chamber. It thus held that a Trial Chamber faced with a deliberate refusal of a party to comply with its orders that threatens the fairness of the trial should seek to bring about that party's compliance

through the imposition of sanctions under Article 71 of the Rome Statute before resorting to the imposition of a stay of proceedings. The Appeals Chamber reversed the Trial Chamber's decision, Dyilo remains in custody, and the trial proceedings resumed.